IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

Criminal Appeal No.1166 of 2004

Pooncholai .. Appellant/Accused

Vs.

State rep. by Inspector of Police
Kadathur Police Station
Dharmapuri District.
(Crime No.48/2002) .. Respondent

Appeal against the judgment dated 30.3.2004 made in S.C.No.313 of 2002 on the file of learned Principal Sessions Judge, Dharmapuri District at Krishnagiri

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For Appellant : Mr.K.Selvarangan

For Respondent : Mr.N.R.Elango
Addl. Public Prosecutor

J U D G M E N T

(Delivered by P.D.DINAKARAN,J.)

The appeal is directed against the judgment dated 30.3.2004 made in Sessions Case No.313 of 2002 on the file of the learned Principal Sessions Judge, Dharmapuri District at Krishnagiri, convicting the appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and imposed a fine of Rs.2,000/-, in default, to undergo six month rigorous imprisonment.

2.1. The case of the prosecution, which is rested on the statement of P.W.1, marked as Ex.P1, is that on the fateful day, at about 4.00 am, the accused/husband threw stone on the head of the deceased/wife, who was sleeping in the pial. On hearing the sound and cry of the deceased, the daughter of the deceased, P.W.3, who was

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sleeping inside the house, came out of the house and saw her mother lying outside with blood oozing from her head and a stone was lying near the head. As the mother was not responding to her, immediately, she went to the house of P.W.1 and informed him.

2.2. P.W.1 went to one Saminathan's house and took him to the house of the deceased. With the help of chimney light, they saw the deceased in the pool of blood, oozing from her head and a stone near the head. Thereafter, P.W.1 informed the parents of the deceased and the Village Administrative Officer, P.W.2 at 6.00 am. The statement given before the Village Administrative Officer is Ex.P1.

2.3. On the basis of the report given by P.W.2 to the Sub Inspector of Police, P.W.9, which is marked as Ex.P2, P.W.9 registered a case in Crime No.49 of 2002 under Section 302, IPC and informed the same to the Inspector of Police, P.W.10. P.W.10 received the copy of the report on 23.1.2002 at 8.30 am, went to scene of occurrence at about 9.00 am, prepared an observation mahazar, Ex.P3 and rough sketch Ex.P8 and seized blood stained earth-MO3, stone-MO4, lungi-MO5, blood stained saree-MO6, blood stained mat-MO7, lantern-MO8, blood stained cement floor-MO9, Sample Cement Floor-MO10 under Ex.P4. He conducted inquest over the body of the deceased. The inquest report is Ex.P9. He arrested the accused on 24.1.2002 at about 7 am.

2.4. The Doctor, P.W.7 attached to the Government Hospital, received Ex.P5, requisition to conduct post mortem on 23.1.2002. The post mortem report is Ex.P6, wherein he has opined that the deceased would appear to have died of shock and haemorrhage due to the injuries sustained about 8 to 14 hours prior to autopsy. However, in his evidence, he has stated that there is a possibility of sustaining injuries by attacking with stone and there is also possibility of instant death.

2.5. P.W.11 is the Inspector of Police, who took up the investigation on 25.1.2002 and filed a final report, after completing investigation on 27.2.2002.

2.6. As the accused denied the charge, he was tried in S.C.No.313 of 2002 on the file of learned Principal Sessions Judge, Dharmapuri District at Krishnagiri. In support of their case, the prosecution examined P.W.1 to P.W.13 and marked Exs.P1 to P12 and MOs.1 to 13.

3. When the accused was questioned under Section 313 of the Code of Criminal Procedure, he denied his involvement in the crime. The accused has neither examined any witness nor marked any document. On appreciation of the oral and documentary evidence, the learned Sessions Judge convicted and sentenced the accused, as referred to earlier. Hence the above appeal.

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4. In a persuasive address on behalf of the appellant/accused, Mr.K.Selvarangan, taking us through the evidence let in on the side of prosecution, submits that the circumstances against the accused remain incomplete. According to him, when P.W.1 himself admitted in his evidence that he did not know the contents of Ex.P1, no reliance can be placed on Ex.P1. It is his submission that though P.W.4 speaks that his sister, deceased herein had informed him that the accused would kill her, P.W.4 did not inform the same to the investigating officer as evident from P.W.10. He has contended that since P.W.3, a child, is living with her maternal grandfather, there is every possibility of tutoring the witness and hence, the evidence of P.W.3 cannot be relied upon.

5. On the other hand, sustaining the conviction and sentence imposed by the trial Court, learned Additional Public Prosecutor submitted that the prosecution has proved the guilt of the appellant/accused beyond reasonable doubts.

6. From the evidence of child witness, P.W.3, P.Ws.1, 2 and the inquest report, Ex.P9 marked through the evidence of the investigating officer, P.W.11, and also the post mortem certificate, Ex.P6, there is no doubt that the death of the deceased is nothing but a homicidal violence, for which the accused was prosecuted, tried and finally convicted and sentenced referred to above.

7. The pristine question involved in this appeal is, whether the trial Judge was right in holding that the prosecution has proved the guilt of the accused beyond reasonable doubts.

8.1. The accused is the husband of the deceased Rani. P.W.3 is their daughter. The prosecution case is that the accused suspecting the fidelity of the deceased wife, put M.O.4 stone (உளிகல்) on her head while she was fast asleep on the pial and caused her instantaneous death.

8.2. Though the prosecution has examined as many as 13 witnesses, viz. P.Ws.1 to 13 to bring home the guilt of the accused, there is no direct eye-witness to the occurrence. Since the occurrence is said to have taken place during night hours, that too, in the house of deceased who happens to be the wife of the accused, it is quite natural that there would not have been any ocular witness, particularly when other inmates are their children, one of whom has been examined as P.W.3, reliability of which will be tested later.

8.3. The motive for the occurrence is stated to be the suspicion of the accused on the fidelity of his wife/deceased. To prove the same, the prosecution examined P.W.4, brother of the deceased. P.W.4,

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in his evidence, has stated that the marriage between the accused and the deceased took place about 11 years back and out of wedlock, they had two children, that the accused suspected the fidelity of the deceased and hence, there were frequent quarrels between the husband and wife, that his sister, deceased here, used to visit him once in a month or fifteen days and complained of the attitude of her husband/accused and that he pacified and took her back to the matrimonial house. It is also his evidence that about 1 or 1½ months prior to the occurrence, when the accused informed him that he would not live with the deceased and he would definitely kill her, he asked the accused to report the matter to the panchayatdars. Thereafter, according to P.W.4, the deceased visited his house and informed that because of unbearable quarrels, she could not live with her husband/accused for which also P.W.4 pacified and sent her back. Then, P.W.4 came to know that his sister was done to death by putting a stone on her head. Except P.W.4, there is no other witness speaking the motive for the occurrence.

8.4. Pointing out that P.W.4 did not state before the investigating officer, P.W.10 during investigation that the accused had informed him that he could not live with the deceased and he would kill her, learned counsel for the appellant sought to disbelieve the evidence of P.W.4. It is true that P.W.10 has admitted that during investigation, P.W.4 did not inform about the assertion of the accused not to live with the deceased and to kill the deceased, but it is only a minor discrepancy which cannot be termed to be fatal to the prosecution case, as it does not materially affect the prosecution case. Further, the solitary testimony of P.W.4 remains unshaken in cross examination. We are, therefore, of the view that there were frequent quarrels between the husband and wife and to that extent, the prosecution proved the motive.

8.5. Coming to the occurrence, besides the evidence of P.Ws.1, 2 and 5, the prosecution mainly rests on the evidence of P.W.3, daughter of the deceased. All of them would categorically say that they saw the deceased lying dead with blood oozing from the wound on the head. P.W.3, who was aged 9 years at the time of giving evidence, has also stated that on the date of occurrence, her parents were quarrelling with each other throughout the day and when herself and her younger brother Singaravelan were taking food at 8.00 p.m., the quarrel between them got aggravated and then, her mother lay down on the pial. It is her evidence that herself and her brother were lying inside the house and her father was sitting on the mat and when her brother asked her father to sleep, he replied that he would sleep later and thereafter, both of them slept. It is also her evidence that at the dawn she heard a noise and she came out and saw the blood oozing from her mother's head and there was a stone lying near her head and when she called her mother, there was no response. She proceeded further saying that she informed the neighbour P.W.1, who, along with one

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Saminathan came and saw with the help of a chimney lamp and declared that her mother died. The evidence of P.W.1 proceeds on the same line. According to him, when P.W.3 called him to see her mother, he along with one Saminathan visited the house of the deceased and with the help of the lamp, saw the deceased lying dead with blood oozing from her head and he also saw a stone. P.W.1 only informed P.W.2 Village Administrative Officer. P.W.2, in his evidence, has stated that P.W.1 came and informed him that the deceased Rani died due to the injury on her head and that he suspected the accused being the murderer. On that basis, P.W.2 recorded Ex.P1 statement and obtained the thumb impression of P.W.1. P.W.2 also visited the scene and saw the deceased lying dead. He also saw a stone lying near the dead body. P.W.5 also a neighbour has stated that she saw the deceased lying dead. P.W.4 brother of the deceased also saw the deceased lying dead. The autopsy doctor found an injury of 20 cm x 10 cm size on the backside head of the deceased. He opined that the deceased would appear to have died of shock and haemorrhage due to the injury sustained. The evidence of all the above witnesses would prove that the deceased died due to the injury on her head and she was done to death in a violent manner.

8.6. The question that arises in sequel is, whether it is the accused who committed the crime. Admittedly, the witnesses, except P.W.3, visited the scene only after the occurrence. P.W.3, daughter of the deceased, is said to have been present at the time of occurrence. In our view, the submission of the learned counsel for the appellant that the evidence of P.W.3 is not trustworthy as she is looked after by her maternal uncle and she might have been tutored appears to be incorrect, as a perusal of the evidence of P.W.3 would go to show that she first understood what was posed to her and gave answers. Her answers are firm, definite and not retractive. However, her evidence is helpful to the prosecution only to prove that the deceased and accused were quarrelling with each other yesternight. According to her, she saw her parents were quarrelling when she and her brother were taking food and thereafter, her mother lay on the pial and both the children went to bed in the house itself. It is her evidence that her brother asked her father to sleep for which the accused replied that he would sleep later and then, they were fast asleep. It is not clear from her evidence as to what happened later; whether her father was sleeping with them in the house or he left the house in the night itself. Her evidence only shows that on hearing a noise she came out and saw her mother lying with blood oozing from the head and there was a stone lying near her mother and immediately, she informed the same to P.W.1. This happened at the dawn of the fateful day. All the witnesses only deposed that they saw the deceased lying dead. The witnesses including P.W.3 do not claim that they saw the accused immediately before or after the occurrence. P.W.1 claims that he immediately rushed to the scene and saw the deceased lying dead. He does not say that he saw the accused fleeing the scene.

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8.7. *The fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record [vide: Ashish Batham v. State of M.P. (2002) 7 SCC 317].*

8.8. As already observed, there is no direct witness to the occurrence and the prosecution relies on the circumstantial evidence. In the eye of law, everybody is innocent save those who have been lawfully convicted. The principle is not mere cant: it is a real and important bulwark of liberty, and nothing which follows is intended to devalue it.

8.9. The only evidence relied upon by the prosecution is the evidence of P.W.3, viz. child witness. It is a settled law that the testimony of child witness needs to be carefully evaluated and must find adequate corroboration before it could be relied upon. The Apex Court in *State of Rajasthan v. Om Prakash ((2002) 5 SCC 745)* held,

> "that the evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied on."

Therefore, the Court should seek corroboration from other evidence to testimony of child witness. The Apex Court in *Bhagwan Singh v. State of M.P. ((2003) 3 SCC 21)* held as under:

> "The law recognizes a child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the

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incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony."

Even though the child witness is reliable provided the same is corroborated by other witnesses, in the instant case, the child witness, P.W.3 does not spell out that she had seen the occurrence, viz. the accused/father attacked the deceased/mother. On the other hand, her whole evidence only goes to show that there was a quarrel on the yesternight between the accused/father and the deceased/mother; her mother lay down on the pial; herself and her younger brother were lying inside the house; her father was sitting on the mat; when her brother asked the father to sleep, he replied that he would sleep later; at the dawn she heard a sound and came out of the house; she saw blood oozing from her mother's head and a stone near the mother's head; and as there was no response from her mother, she went and informed P.W.1. Except the evidence of P.W.3, there was no other evidence to corroborate with the statement of P.W.3 that the accused was present in the house on the date of occurrence, nor P.W.3 had spoken that she saw the occurrence directly. Therefore, the case of the prosecution is entirely based on circumstantial evidence.

8.10. In the case based on circumstantial evidence, the prosecution has to establish all the links in the chain of circumstances which would have to show that in all probability, it is only the accused person who could have committed the crime. Since every circumstantial evidence relied upon by the prosecution has a probative link for a safe conviction, the same must not only satisfy the test of reasonability, but also be confirmed on certainty. The circumstance relied upon in support of conviction must be fully established and the weight of evidence furnished by those circumstances must be so complete. The link in the chain should be fully established to a conclusive nature but not on mere suspicion to hold the accused guilty. In other words, all the circumstances cumulatively taken together should lead only to the irresistible conclusion that the accused alone is the author of the crime. Therefore, when the case of the prosecution is based on circumstantial evidence, each and every incriminating substance must be clearly established by a reliable and clinching evidence and the circumstances must be proved from a chain of evidence, from which only irresistible conclusion for the guilt of the accused can be safely drawn. Hence, we are inclined to analyse the evidence microscopically to satisfy ourselves as to the chain of the circumstances that led to the only inference of the guilt of the accused without any break in the link.

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8.11. In this case, the prosecution has established, (i) there were frequent quarrels between the husband and wife; (ii) the husband and wife were also quarrelling with each other yesternight of the fateful day; (iii) due to the quarrel, the deceased lay on the pial and the accused was sitting on the mat; (iv) at the dawn the minor daughter, P.W.3 heard a noise and came out and saw the deceased lying dead with pool of blood; (v) immediately other witnesses visited the scene and saw the deceased lying dead with blood oozing from the head; and (vi) all the witnesses saw a stone lying near the dead body. Of course, all the above circumstances have been proved by the prosecution. On seeing the dead body, P.W.1 informed P.W.2 Village Administrative Officer who, in turn, informed the police and police took up the investigation, followed by autopsy and arrest of the accused and there is no lacuna in it.

8.12. The prosecution, however, has failed to establish the circumstance that the accused was present at the scene immediately before or after the occurrence. Therefore, as rightly pointed out by the learned counsel for the appellant, the necessary link in the chain of circumstances is missing, viz. the very presence of the accused at the time and in the place of occurrence, is not satisfactorily established by the prosecution to stand the test of reliability, as spoken to by the child witness, P.W.3. The trial Court should have taken into account the evidence of P.W.1 in cross examination that the accused used to go to Erode and Panchapalli for quarrying work and no one knows at what time the accused leaves or returns to the house. In such circumstance, the suggestion put up by the defence to P.W.4 to the effect that at the time of occurrence the accused was not available in the village and he had gone to Erode for coolie work cannot be lightly brushed aside. The evidence of P.W.1 in cross examination is that when his thumb impression was obtained, the police was also present, while the chief examination goes to show that P.W.1 met P.W.2 at Maniampadi where he affixed his thumb impression on the statement recorded by P.W.2, which is another circumstance that would go in favour of the accused. On the other hand, the trial Court based its conviction merely on the medical evidence, the recovery of weapon, M.O.4, the presence of bloodstains and the arrest of accused in a remote place; but, failed to notice that there is a snap in the chain of circumstances roping the accused in the crime.

8.13. The snap in the chain of circumstances leads to the conclusion that the accused seems to have been roped in merely on suspicion. It is true that the prosecution has been able to establish the motive as discussed above, but that by itself is not sufficient to base a conviction when the important circumstance that it is the accused alone who committed the crime is missing.

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In the above circumstances, we find that though the deceased was done to death in a cruel manner, it is not safe to conclude that it is the accused who committed the crime and we therefore hold that the conviction and sentence imposed on the accused cannot be sustained. Accordingly, the conviction and sentence under section 302 IPC imposed by the trial Court are set aside and the appeal is allowed. The accused is set at liberty. Fine amount if any paid, shall be refunded to him.

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Asst.Registrar

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Sub Asst.Registrar

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2. The Public Prosecutor
   High Court, Madras.
3. The Inspector of Police
   Kadathur Police Station
   Dharmapuri District.
4. The Collector
   Dharmapuri District.
5. The Superintendent, Central Prison, Vellore.
6. The Director General of Police, Chennai.

1 cc to Mr.K.Selvarangam, Advocate, SR.45232

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